



REPUBLIC OF KENYA



AA v ZY (Matrimonial Cause E009 of 2022) [2022] KEKC 163 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEKC 163 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
MATRIMONIAL CAUSE E009 OF 2022
IA HUSSEIN, PK
OCTOBER 4, 2022**

BETWEEN

AA PETITIONER

AND

ZY RESPONDENT

RULING

1. By an application dated 13.7.22, the petitioner/applicant seeks in the main, execution of the court order issued on June 29, 2022 against the respondent.
2. The background of this case is that both parties married under Islamic law and were not blessed with any child.
3. The applicant pursuant to the suit filed before this court on April 8, 2022 sought orders against the respondent for an order compelling the respondent to go back to the Matrimonial home and an order compelling the respondent to respect the petitioner and ask her to go for an HIV/AIDS test.
4. On June 29, 2022 the court entered judgment vide the following orders:
 - I. That the respondent be and is hereby ordered to rejoin the company of the petitioner at her matrimonial home.
 - II. That in alternative to order (I) above the respondent to release herself through a khul'a by compensating the petitioner.
 - III. That the respondent cannot be compelled to undergo HIV/AIDS test without her informed consent.
 - IV. No, order, as to, cost
5. It is the applicant's case that the respondent failed to rejoin the company of the applicant at their matrimonial home or compensated the petitioner by releasing herself from the marriage and since



there are no prospects for the respondent to comply with the former, he prays that he be paid the compensation at the tune of Kshs. 60,000/- is the amount that he incurred by the applicant since he married the respondent.

6. The respondent did file a reply against the application. The respondent refuted the allegation raised by the applicant and stated that save as Kshs. 20,000/- that was given to her by the applicant. She further maintained that in fact, the applicant did not pay her dowry amounting to Kshs. 6,000/- and that since she is not willing to go back to her matrimonial home she be allowed to release herself through khul'a.
7. I have considered the Application and the submissions made before me by the parties. The matter before me is principally touching on compensation for khul'a.
8. The court's attention was drawn to Q2:229, where it stated that:

“.....then if you fear that they would not be able to keep the limits, ordained by Allah then there is no sin on either of them, if she gives back, Mahr (dower) or a part of it for her Al-khul' (divorce).....”

9. The court attention was also drawn to *Abdulrahman's. 'The Islamic law'* (1997 Reprint) pg. 168 where it's stated that;

Islam marriage is a contract and the contract should be made to work but, not when it becomes humanly impossible to do so. It's only in such unavoidable circumstances that divorce is permitted under shariah.

And that:

When a Marriage becomes impossible to work it's better to separate amicably rather than drag on indefinitely making the family home a hell.

10. The court attention was drawn also to Bukhari's, '*Sabibul - Bukhari*, 'Vol.7 Hno.197 and also, *As Suyuti's sinnanu-Nisaii* vol. 8 page 5-16 also *Sunnanu - abu Dawud* vol. 4 page 268-69 in case of *Habiba v Thabit (R.a)*,

The wife of Thabit (Habiba) came to the prophet (S.A.W) and said 'O' Messages of God. I don't hate Thabit either because of his faith or his nature except that I fear unbelief (If I remain with him). On that God's messages (S.A.W) said (to her) "will you give back his orchard? She said 'Yes and she gave it back to him and He (Prophet) ordered him and so they separated.

11. However, a khula divorce is effected through an order for a wife to compensate the husband to release herself from the marital union where no fault may be attributed to the husband, and the quantum of compensation differs as elucidated below.
12. It is a trite law under Maliki and Shafii schools of legal thought that, it's permissible for a wife to compensate the husband equal or less or more to the value of the agreed mahr.¹ According to the Hambali school of thought, a husband can only take what is equivalent to the value of the agreed

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dowry,² and the Hanafiyah school of thought opines that if a husband is at fault for breaking the marriage he is not entitled to compensation unless the breakdown of marriage is attributed to a wife who is seeking a release through khula and in this case the husband is entitled to receive compensation as opined by both the Maliki and Shafii schools of legal thought.³ See *Mausu'a al fiqh al kuwaitiyah* Vol. 19

13. Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage regulated by law, for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another.
14. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into a marriage, therefore, is to enter into a relationship that has public significance as well and parties cannot choose to exit the marriage by a constructive withdrawal whenever one wishes and the same can only be exited through the same door.
15. In the instant case, the applicant is not at fault for the breakdown of the marriage and as a result, the Respondent shall relinquish her right to recover the unpaid dowry and further compensate the applicant at the tune of Kshs 10,000/- payable within 5 months.

DATED, SIGNED, AND DELIVERED IN ISIOLO THIS 4TH OCTOBER 2022

AJ ISHAQ
PRINCIPAL KADHI

In the presence of: -

The Applicant & The Respondent

Mr Ahmed - Court Assistant

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